Supreme Court, U.S.
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No. 94-861

In The

Supreme Court of the United States

October Term, 1994

DOW CORNING CORPORATION,

Petitioner,

v.

MARIANN HOPKINS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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11 pp

TABLE OF CONTENTS

Page

RESPONDENTS ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ARE SUPPORTED NEITHER BY THE RECORD NOR APPLICABLE LAW 1

I. AT EVERY STAGE OF THE PROCEEDINGS BELOW, PETITIONER OBJECTED TO THE ADMISSIBILITY OF RESPONDENT'S OPINION TESTIMONY BECAUSE THE MEANS OF REACHING THEIR OPINIONS HAD NO ACCEPTABLE SCIENTIFIC BASIS 1

II. PETITIONER PROPERLY PRESERVED ITS DUE PROCESS QUESTION 4

TABLE OF AUTHORITIES

Page(s)

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 5

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 113 S. Ct. 2786 (1993) 1, 2, 3, 4

Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S. Ct. 2331 (1994) 6

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ...4, 5

United States Constitution

Fifth Amendment..... 5

Fourteenth Amendment..... 5

Federal Rules of Civil Procedure, Rule 59..... 5

RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ARE SUPPORTED NEITHER BY THE RECORD NOR APPLICABLE LAW

Respondent does not deny the importance of the questions presented nor the ripeness of those questions for decision by this Court. Instead, Respondent argues that the questions were not preserved in the lower courts. Respondent is mistaken.

I. AT EVERY STAGE OF THE PROCEEDINGS BELOW, PETITIONER OBJECTED TO THE ADMISSIBILITY OF RESPONDENT'S OPINION TESTIMONY BECAUSE THE MEANS OF REACHING THEIR OPINIONS HAD NO ACCEPTABLE SCIENTIFIC BASIS

Petitioner's objection to the admission of Respondent's expert testimony commenced with its Motion *in limine* to Exclude Expert Testimony in which it argued that "under Federal Rule of Evidence 703, the Court shall exclude any testimony by plaintiff's experts where there is no acceptable or reliable basis for their opinion." (June 18, 1991 Motion at 2-3.) The argument was repeated in objections to the admission of the experts' testimony during trial. Its objections were even more extensively argued in Petitioner's post-trial motions.[1]

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[1] Petitioner's supplemental letter brief, filed after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S. Ct. 2786 (1993) came down and before the Court of Appeals filed its opinion, included substantial quotations from the Petitioner's arguments supporting its post-trial motions. That letter brief is set forth in the Appendix to Respondent's Opposition to

On appeal, the argument was renewed in detail charging prejudicial error in the admission of the testimony of Respondent's expert witnesses because their opinions were not based on any methodology that had been generally accepted by any relevant scientific community; there was no scientific basis for the opinions; and the opinions were not sufficiently reliable to be admitted. (Petitioner/Appellant's Opening Brief, pp. 44-50.) The attack was elaborated in its Petition for Rehearing arguing that this Court's opinion in *Daubert* fully supported its prior objections to admissibility. (Petition for Rehearing, pp. 6-10.)

Respondent argues that the question was nevertheless not preserved because Petitioner is only claiming error in the denial of its motion for summary judgment which was based, in part, on the ground that Respondent had failed to produce any admissible evidence on causation because her expert testimony on the subject was not based on any scientifically acceptable method. (OPC, p. 16.) In its Petition before this Court and its briefs below, the prejudicial error claimed is and was the inadmissibility of Respondent's causation testimony at trial because it failed to meet any of the criteria for scientific reliability.[2]

Petition for Writ of Certiorari ("OPC") as Appendix B, pp. A-3 through A-9.) Those arguments make unmistakably clear that the challenge to admissibility was on the grounds later accepted in *Daubert*.

[2] Petitioner did not attack denial of its summary judgment motion in the Court of Appeals because the law of the Circuit foreclosed that attack when the appeal is from a judgment entered after a full trial on the merits. The Petition does make a

Respondent argues that Petitioner was required to raise the question of the sufficiency of Respondent's expert causation testimony at the directed verdict stage. (OPC, p. 18.) Petitioner did so. 18 RT 2286-87. The Petitioner thereafter raised the precise question in its opening brief on appeal, contending that the methodology by which the expert witnesses reached their opinions was not scientifically acceptable. (Petitioner's/Appellant's Opening Brief, pp. 45-50.) Respondent incorrectly contends that (1) Petitioner attacked only the conclusions of plaintiff's treating physicians (it did not) and that (2) it argued only that the experts' conclusions were not expressed at the level of reasonable medical probability. (OPC, p. 18.) The record establishes the contrary.

Finally, Respondent appears to contend that the question was not preserved below because Petitioner did not make "a *Daubert*-style analysis of *the methodology* of Hopkins' experts." [Emphasis in original.] (OPC, p. 20.) The substance of the numerous attacks in the lower courts on the admissibility of the expert testimony was not materially different from the *Daubert* analysis.[3] Petitioner

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policy argument that the admissibility question should be decided on summary judgment; accordingly, to encourage that result, it is desirable to be able to seek review of the error in denying summary judgment. However, summary judgment error was not the basis of the appeal in the lower court, and it is not the foundation of the Petition before this Court.

[3] Although Petitioner did not use the word "methodology" in its objections to the experts' testimony in the trial court, it invoked the identical concept using the words "scientific basis," "steps," and "scientific foundation." On appeal, Petitioner used the explicit term "methodology" in attacking the lack of any scientific basis for the expression of Respondent's experts' opinions.

obviously could not have relied on this Court's *Daubert* opinion before it came down. After it did, Petitioner attacked the admissibility of the testimony precisely on *Daubert* grounds.

II. PETITIONER PROPERLY PRESERVED ITS DUE PROCESS QUESTION

Respondent argues that Petitioner did not raise its due process arguments below because it did not renew its due process arguments in its Petition for Rehearing or in its motion to stay mandate in the Court of Appeals. (OPC, p. 21.) The statement is not accurate.

As Respondent acknowledges, Petitioner challenged the validity of the punitive damage award because California's punitive damage law does not meet the constitutional criteria prescribed by *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991). In its initial motion to stay the mandate after rehearing had been denied, Petitioner did not present the due process point because the mandate would have gone down to the district court within a few days and preparation of a certiorari petition had only begun. Petitioner presented the precise due process point to the Court of Appeals in its renewed motion to stay or recall the mandate pending its filing of its certiorari petition with this Court; the motion was supported by the declaration of Shirley M. Hufstedler to which was annexed the draft of the certiorari petition that had then been sent to the printer.[4] A copy of the Court of Appeals'

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[4] The draft sent to the Court of Appeal, with non-substantive corrections, is the Petition filed with this Court.

order granting the motion to stay the mandate is annexed hereto as Appendix A.

Respondent contends that Petitioner has taken inconsistent positions with respect to its due process attack. (OPC, p. 22.) Petitioner is again mistaken.

Analysis of the due process issue challenging an award of punitive damages in a diversity action is a two-step process: (1) The state law of punitive damages must initially be examined to determine whether it meets minimum due process standards required by the Fourteenth Amendment, as interpreted and applied in *Haslip,* 499 U.S. at 21-22; and (2) federal law must be examined to determine whether the federal standards of review of such awards meet the due process minima required by the Fifth Amendment. Petitioner has consistently argued in this Court and below that California punitive damages law does not meet the constitutional minima of *Haslip;* California law does not provide constraints on jury discretion that have been provided by Alabama and Oregon. (Petition, pp. 17-18.) The Court of Appeals did not apply California law in reviewing compliance with *Haslip;* instead, it applied the criteria adopted in Alabama, which California has never adopted. The Court of Appeals did not reach the second stage of the due process inquiry. (Petition, pp. 16-18.)

Respondent's contention that this Court in *Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989) held that federal review pursuant to Rule 59 of the Federal Rules of Civil Procedure meets constitutional standards is incorrect. (OPC, p. 21.) The due process issue was neither raised nor decided in *Browning-Ferris.* The Court decided

only that "neither federal common law nor the Excessive Fines Clause of the Eighth Amendment provides a basis for disturbing the jury's punitive damage award in this case." 492 U.S. at 280.

Respondent also argues that the common law provides ample guidance on the amount of procedural process that is due in a federal court reviewing a punitive damage award in a diversity case, citing *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331 (1994). Although that case is relevant in other particulars, it provides no guidance on the question presented because that case was not tried in a federal court.

Respondent complains that the Petition does not explain how it was hurt by the lack of any meaningful judicial scrutiny of the punitive award against it. (OPC, p. 23.) The Petition argued that three levels of standardless discretion resulted in an award of punitive damages that arbitrarily deprived Petitioner of its property. (Petition, pp. 17, 23.) The absence of any meaningful criteria to guide the jury and any meaningful judicial review permitted the jury to vent its spleen against a big corporation, without any significant local presence, and at the same time to express its sympathy for Respondent. The result is to force Petitioner to pay Respondent and her lawyers many millions of dollars as a quasi-criminal fine with none of the procedural protections that would be required to uphold a $500 fine imposed in a criminal case.

The questions presented by this Petition have been properly raised below, and they are ripe for decision by this Court.

Dated: December 1, 1994

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIANN HOPKINS, Plaintiff-Appellee, v. DOW CORNING CORPORATION, Defendant-Appellant.	NO. 92-16132 D.C. No. CV-88-04703-TEH ORDER ("Filed" stamped November 14, 1994)

Before: HUG, Circuit Judge.

Dow Corning's November 9, 1994 motion to stay the issuance of the mandate is hereby GRANTED. Dow Corning has furnished the court with a copy of the petition for the writ of certiorari that was sent to the printer and will be filed with the United States Supreme Court when printed.

GOOD CAUSE APPEARING, the stay is granted to and including November 18, 1994. Provided that the petition for a writ of certiorari is filed with the Supreme Court on or before that date, this stay will continue pending final disposition of the petition by the United States Supreme Court.